

SENATE BILL REPORT

HB 1068

As Reported by Senate Committee On:
Judiciary, March 18, 2009

Title: An act relating to the Washington business corporation act.

Brief Description: Revising the Washington business corporation act.

Sponsors: Representatives Pedersen and Rodne; by request of Washington State Bar Association.

Brief History: Passed House: 2/27/09, 94-0.

Committee Activity: Judiciary: 3/18/09 [DP].

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass.

Signed by Senators Kline, Chair; Regala, Vice Chair; McCaslin, Ranking Minority Member; Kohl-Welles and Roach.

Staff: Juliana Roe (786-7438)

Background: Under the Washington Business Corporation Act (WBCA), action required or permitted to be taken at a shareholders' meeting may be taken without a meeting or a vote if the action is taken by all shareholders entitled to vote on the action (unanimous consent). Action may be taken without a meeting or a vote by less than unanimous consent if (1) authorized by the articles of incorporation; (2) the consenting shareholders hold as many votes as would be necessary to take the action if all shares entitled to vote were present at a meeting; and (3) the corporation is not a public corporation. Action taken without a meeting or vote is taken by shareholder consent by a written or electronically-transmitted record.

The "record date," which is the date that determines which shareholders are entitled to take action, is the date that the first shareholder consent is executed (meaning signed or electronically transmitted). If there are not enough shareholder consents delivered to the corporation within 60 days from the earliest dated delivered consent, then the consents are not effective.

Notice of the taking of action by shareholders without a meeting by less than unanimous consent must be given before the effective date of the action. The corporation's articles of

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incorporation must specify the amount and form of notice required to nonconsenting shareholders. Notice must go to nonconsenting shareholders entitled to vote, and if the WBCA would otherwise require notice of the action to be given to nonvoting shareholders, then to those shareholders as well.

If the action is of a type that would constitute a "significant business transaction" as defined by the WBCA, or would entitle a shareholder to exercise dissenter rights, such as a merger or acquisition, then certain types of notice to shareholders must be given. The statutes governing "significant business transactions" (often referred to as the anti-takeover laws) apply to public corporations (which cannot use the less-than-unanimous consent provisions) and to a few private corporations that opt in to the anti-takeover laws.

The WBCA allows for plurality voting to elect the directors of a corporation. Plurality voting allows for the election of a director candidate who gets more votes than other candidates, but does not require a candidate to get a majority of votes. In 2007 the Legislature passed a bill that, among other things, gave corporations increased ability to modify plurality voting and to allow for different voting standards.

Summary of Bill: The term "corporate action" is defined and used throughout the WBCA for consistency and to clarify the distinction between the matter being approved versus the action of approving. Other technical corrections are made to reflect changes made in 2007 on plurality voting.

The statute governing shareholder actions taken without a shareholders' meeting or vote is amended, specifically the notice provisions. Notice that shareholder consents are being sought must be given on or promptly after the record date to all shareholders entitled to vote on the record date who have not executed consent. If the WBCA would otherwise require that notice of a meeting to take the action be given to nonconsenting shareholders, then notice must be provided to all nonvoting shareholders as well (regardless of whether the action is by unanimous or less-than-unanimous consent). Notice that shareholder consent is being sought may be given either by the corporation or by another person soliciting shareholder consents.

In addition, a second notice stating that sufficient shareholder consents have been executed must be given by the corporation promptly after delivery to the corporation of shareholder consents sufficient to approve the action.

A corporation's articles of incorporation no longer need to specify the amount and form of notice required for action taken by less than unanimous consent. The more specific provisions governing notice for significant business transactions and dissenter's rights are removed.

The first shareholder consent executed need not be delivered to the corporation on the date of the execution in order for that execution date to be the record date.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This bill was brought forward by the Washington State Bar Association (WSBA). Until 1997 there were two ways for shareholders to approve actions. One was for them to have a meeting with a quorum and the other was to gather a unanimous consent from every shareholder. Depending on the number of shareholders, that could be cumbersome. It meant that you had situations for classes of companies where there were delays. In 1997 the Legislature decided to permit action without unanimous consent and purposely did not follow Delaware's rule. Washington, instead, made a decision that there should be prior notice to give them an opportunity to object to the action before it went into effect. In all the years since then, lawyers have interpreted these rules very differently. This has led to circumstances where there have been dramatic and heated discussions between lawyers. This bill clarifies and provides flexibility and is protective of shareholders. There are a few technical changes that have been made in this bill. In 2007 a couple of cross references and internal numbers were wrong. They are important, but not substantive.

Persons Testifying: PRO: Representative Pederson, prime sponsor; John Steel, WSBA Board of Governors.